No. 351.

Brief of Deming for Orr et al.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901

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ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH and GEORGE B. COOKSEY, as Executors and Trustees of the Last Will and Testament of DAVID DOWS, Senior, Deceased, *et al.*,

Plaintiffs in Error.

vs.

THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,

Defendants in Error.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

BRIEF OF ARGUMENT

ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF CONTENTION THAT PORTIONS OF THE NEW YORK TRANSFER TAX LAW ARE IN CONFLICT WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

HORACE E. DEMING,
JULIUS HENRY COHEN,
of Counsel for Plaintiffs in Error.

LIVINGSTON MIDDLEDITCH CO., 63 CHAMBERS ST., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 351.

ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH and GEORGE B. COOKSEY, as Executors and Trustees of the last Will and Testament of DAVID DOWS, Sr., deceased, *et al.*,

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THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,

Defendants in Error.

Brief for Plaintiffs in Error.

This appeal comes to this Court upon a writ of error to the Surrogate's Court of the County of New York, State of New York. The plaintiffs in error are the Executors and Trustees of the last Will and Testament of David Dows, Sr., who died in 1890, the Executors of the last Will and Testament of David Dows, Jr., who died in 1899, and the guardians of David Dows, 3rd, Robert and Kenneth Dows, minor children of David Dows, Jr. (Record, fols. 99-100). The defendants in

error are the Comptroller of the State of New York and the Comptroller of the City of New York (fol. 104).

The questions presented arise out of Article X (entitled Taxable Transfers) of the New York Tax Law (Chap. 908, Laws of 1896), and the so-called "Power of Appointment Amendment" (Chap. 284, Laws of 1897) to Section 220 of said Article. The Amendment is sub-division 5 of said Section 220. It reads as follows:

> "5. Whenever any person or corporation "shall exercise a power of appointment derived "from any disposition of property made either be- "fore or after the passage of this act, such appoint- "ment when made shall be deemed a transfer tax- "able under the provisions of this act in the same "manner as though the property to which such ap- "pointment relates belonged absolutely to the donee "of such power and had been bequeathed or de- "vised by such donee by will; and whenever any "person or corporation possessing such a power of "appointment so derived shall omit or fail to ex- "ercise the same within the time provided there- "for, in whole or in part, a transfer taxable under "the provisions of this act shall be deemed to take "place to the extent of such omissions or failure, "in the same manner as though the persons or cor- "porations thereby becoming entitled to the pos- "session or enjoyment of the property to which "such power related had succeeded thereto by a "will of the donee of the power failing to exercise "such power, taking effect at the time of such "omission or failure."

The plaintiffs in error raised their objections at the very inception of the proceeding (fols. 34-40), upon the appeal to the Surrogate (fols. 44-50), upon the appeal to the Appellate Division of the Supreme Court of New York State, and upon appeal to the Court of Appeals (fols. 60-67), and in each instance the objections were passed upon adversely to the plaintiffs in error (fols. 80-87).

The assignment of errors present these objections to this Court for review (fols. 94-100).

Facts.

David Dows, Sr., died March 30th, 1890. The Transfer Tax Law, then in force (Chap. 483, Laws of 1885, as amended in 1887 and 1889) did not tax transfers by will of the testator's property to lineal descendants.

By the Sixth Division of his will David Dows, Sr., devised and bequeathed certain real estate to trustees for the life of his son, David Dows, Jr., to pay the income thereof to his said son.

> "And upon the death of my said son the said "property with all accumulations of interest, income and profits shall vest absolutely, and at "once, in such of his children him surviving, and "the issue of his deceased children as he may by "his last will and testament designate and appoint "and in such manner, and upon such terms, as he "may legally impose. But in case my said son "David Dows, Jr., die intestate, then said property, with all accumulations of interest, income "and profits shall vest absolutely and at once in "his children him surviving, share and share alike, "and the issue of his deceased children (such issue "to take share and share alike the portion which "the parent would have received by the terms here-"of if living) to be paid to them at the times and "in the proportions following, to wit" (fols 8-10).

By the Eighth Division of his will, David Dows, Sr., devised and bequeathed an undivided one-eighth of his residuary estate in a similar manner (fols. 14-15).

David Dows, Sr., left him surviving David Dows, Jr., and three sons of the latter, namely, David Dows, 3d, Robert Dows and Kenneth Dows. No children were born to David Dows, Jr., after his father's death. He himself died January 13th, 1899, leaving David Dows, 3d, Robert Dows and Kenneth Dows him surviving (fols. 25-26).

David Dows, Jr., appointed the property among said three sons as follows:

Each of the sons has the use and income of an undivided three forty-eighths, an undivided four forty-eighths and an undivided nine forty-eighths of said

property until the son Robert dies or attains twenty-one years, twenty-five years and thirty years respectively, whichever event shall sooner happen. Upon the termination of the respective life estates the principal of said undivided three forty-eighths, four forty-eighths and nine forty-eighths goes in absolute ownership to one or other of the three sons (fols. 19-22).

Each of said life estates and remainders were held to be taxable and were taxed upon their value as it was appraised to be at the death of David Dows, Jr., on January 13th, 1899 (fols. 42-3, 52), and without reference to the character or value of the property at the death of David Dows, Sr., or to the fact that at the death of David Dows, Jr., the corpus consisted in large part of untaxable bonds and stocks (fols. 26, 27, 37-8, 40-1, 32-3, 42-3).

Specification of the Errors.

I.

Subdivision 5 of Section 220 of the Tax Law of the State of New York, whether construed as a tax upon property or a charge for a privilege accorded by the State, is unconstitutional, null and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law, and to deny to such citizens the equal protection of the laws.

(1). Under the law as it stood at his death, in 1890, the testator, David Dows, Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren, David Dows, 3rd, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death, in 1890, his said grandchildren (then living) acquired vested rights in the property transferred. This amendment attempts to diminish

and impair their vested rights. It seeks in 1899 to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property, the full right to which had vested in them many years before.

(2). This subdivision arbitrarily selects certain individuals and subjects them and their property to higher taxes or charges than are imposed upon other individuals or like property of other individuals in the same community.

(3). This subdivision, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax, or charge, upon the property and persons of an arbitrarily selected class. If there happens to be a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised, and every person receiving such property is arbitrarily singled out and taxed or charged at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

(4). This subdivision imposes an unequal, arbitrary, and discriminating tax or charge upon property and persons. Its classification of persons and property is not based upon any reasonable ground, but is a mere arbitrary selection.

(5). This subdivision attempts, by arbitrary definition, to change the character of a thing by merely changing its name and by pronouncing that a transfer which is not a transfer to take away the vested property rights of citizens, and to impose a special charge upon an arbitrarily selected class.

II.

The Tax Law of the State of New York expressly exempts from taxation, or charge, all real estate passing

to lineal descendants by descent or devise, and all such descendants so taking title to real estate from ancestors (Section 221); said exemption is a general exemption and applies to all estates. Under the definitions in the law, as interpreted by the courts of the State of New York, all property which was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the ancestor who owned it, and the property in the meantime has been converted into cash or securities.

The decision of the court below in this cause reverses this rule and holds that this exemption only applies to lineal descendants whose property may not have been mentioned in a power of appointment, and that as to lineal descendants whose property has been so mentioned the character of the property at the time of the death of the donee of the power (exercised or unexercised) controls; that in the case at bar, although over two millions of dollars of the property was real estate at the death of David Dows, Senior, descending to lineal descendants, they are deprived of the exemption under Section 221. By depriving the lineal descendants of David Dows, Senior, of the benefits of the general exemption established by Section 221, the plaintiffs in error submit that said Subdivision 5 of Section 220, and the proceedings of the court below in this cause, are unconstitutional under the Fourteenth Amendment to the Constitution of the United States, in that they deprive them of the equal protection of the laws, abridge their privileges and immunities as citizens of the United States, and take their property without due process of law.

III.

The plaintiffs in error submit that in violation of the Fourteenth Amendment to the Constitution of the United States they have been deprived by the proceedings in this cause of the equal protection of the laws of

the said State of New York, their privileges and immunities as citizens of the United States are abridged, and their property taken without due process of law in the following respects:

(1). Under Section 4, Subdivision 16, of said Tax Law of said State of New York, all citizens of said State are exempt from taxation upon their stocks in incorporated companies liable to taxation upon their capital. Despite the protests of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $1,850,000.00 of such stocks of incorporated companies.

(2). Under Chapter 80 of the Laws of 1897 of said State of New York, amending Section 4, Subdivision 6, of said Tax Law, bonds thereafter issued for the improvement of the canal of said State of New York are made exempt from taxation. Despite the protest of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $51,000 of New York State canal-improvement bonds.

(3) Under said Chapter 80 of said Laws of 1897, as well as under Section 7 of the General Municipal Law of said State of New York (Chapter 685 of the Laws of 1892) bonds theretofore issued for the purpose of paying up or retiring the indebtedness of a municipal corporation are exempted from taxation. Despite the protest of the plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $109,000.00 of such municipal corporation bonds.

The plaintiffs in error further submit that the proceedings hereunder are in violation of Section 10 of Article I of the Constitution of the United States in the following respects:

The said statute of the State of New York under

which said canal improvement and municipal bonds were exempted from taxation formed part of the contracts under which said bonds were purchased. The statute under which said Court of Appeals in this cause holds such bonds now taxable is, therefore, an impairment of the obligation of a contract under which said bonds were purchased.

IV.

The plaintiffs in error submit that even if said subdivision 5 of Section 220 of the Tax Law be valid, the tax upon or charge for the various remainders to David Dows, 3d, Robert Dows and Kenneth Dows cannot be made payable until the remaindermen come into actual enjoyment and possession of the *corpus* of their remainders and that the construction of the Transfer Tax Law under which such remainders and remaindermen are held in this cause to be presently taxable and chargeable, with interest and penalty to be added in case of postponement, is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law, and denies to such citizens the equal protection of the laws.

Preliminary Statement.

When A. dies owning land or commodities, his ownership ceases by the mere fact of death. A dead man cannot own anything. He does not exist. When he ceases to exist, his ownership necessarily ceases to exist.

Neither land nor commodities nor anything else constitute property unless owned by some one. Property necessarily implies an owner. Property except as something belonging to (owned by) some one is simply unthinkable.

To speak of the property or estate of a dead man is to use a mere figure of speech and often a misleading one. What is really meant is the things which he

owned and ceased to own at the moment of death and which continue to exist thereafter.

Upon the death of A. all the things that were his at the moment of death and persist thereafter immediately pass to another owner, become the property of some one. The termination of A.'s ownership and the commencement of the succeeding ownership occur instantaneously and simultaneously.

Who the successor is, whether the State or some one else, is determined by the State, and the State is the successor unless it expressly decrees otherwise. Neither the children nor other relatives of a deceased—much less strangers in blood—are deemed to have any natural right to become the owners of anything he owned at the moment of his death. A. may not give anything, the gift to take effect at A.'s death, unless the State so decrees. And B. may not, at A.'s death, become the owner of anything formerly belonging to A. unless the State so decrees. When, therefore, the property of A. passes to (becomes the property of) B. under A.'s will, it is because the State so directs. It is equally the State which authorizes the passing of A.'s property to B. on A.'s death without a will.

The State may, and sometimes does, say that a part of A.'s property shall become its property, pass to it, and only the remainder to some one else. This succeeding by the State to the ownership of a part of what belonged to A. at the moment of his death is not a taking or a taxing of A.'s property; A.'s existence is at an end, and with it his ownership of anything. Nor is it a taking or taxing of the property of any one else, or a tax upon the transfer of anything to or from A. It is the change of ownership from A. to the State at the moment of A.'s death. What was A.'s becomes the State's. When A.'s ownership ceases the State's begins.

Or, in another form: The things which A. owned at the moment of death and persist thereafter, become necessarily by the mere fact of death, the property of (belong to) succeeding owners. The State, except in so far as it otherwise permits, is the succeeding owner. The State, then, takes nothing, appropriates nothing, taxes nothing belonging to any one else when it retains

to itself any portion of what was A.'s at the moment of his death. On the contrary, the State, except in so far as it voluntarily renounces its right, becomes the succeeding owner at A.'s death of everything belonging to him and persisting thereafter.

The foregoing propositions are self-proving. It would seem unnecessary to state them. But the whole matter of "inheritance taxes" and "transfer taxes," so-called, has been so befogged by subtle distinctions and tortuous reasoning that it is desirable to return to and keep in mind the very simple nature of what happens when a man dies and the State succeeds to the ownership of the whole or a part of what was the decedent's. When A. dies, owning anything capable of continued existence after his death, *his* ownership ceases and simultaneously begins the ownership of the State or of such person or persons as the State chooses. The change or transfer or succession of ownership is instantaneous. There is no interval between A.'s death and the vesting of the successor title.

Just as it is self-evident that the instant when A. dies is the instant when, and when only, the whole or any part of what then belonged to him can pass to (become the property of) the State as succeeding owner; so it is self-evident that, if under the grant of the State a part of what belonged to A. at the moment of death passes to the State and the remainder to others, the State cannot *thereafter* obtain the whole or any part of this remainder except as something belonging to (the property of) those others. Through the State's own conduct it has already become the property of some one else, and the State in dealing with it must treat it not as its own property but as the property of some one else.

We may style the passing to the State of a portion of a decedent's property at the moment of death an "inheritance tax," a "succession tax," a "death duty," or a "transfer tax," but, however styled, the essential nature of the transaction is as described.

In the discussion of "Inheritance Tax" laws, certain

phrases are frequently used which cannot, we think, be made with safety the basis of judicial reasoning or decision.

The following are samples:

"An Inheritance Tax" is not a tax upon property but upon the succession.

What does "succession" mean in this phrase? When A. devises or bequeathes to B., is B.'s succession "*the things B. has succeeded to which were A.'s at the moment of A.'s death?*" If so, then B.'s "succession" is something owned by B., is *B.'s property,* the inheritance tax is a tax upon property, and the phrase quoted is self-contradictory.

Does it mean "*the grant to B. by the State of succeeding at the moment of A.'s death to things which were A.'s?*" If so, this grant is *property.* Nor is its essential character as property changed by styling it a "privilege." It is still property. At any time before A.'s death the State may wholly withdraw or diminish the "privilege," but whatever of it remains at A.'s death is a property right in B., as much as his horse or his house. If this second definition be adopted, the "inheritance tax" is a tax upon property and the phrase quoted is self-contradictory.

Does B.'s "succession" mean "*his succeeding in ownership to something that was A.'s at the moment of death?*" If so, then "succession" means a *change* of ownership from A. to B. This is not property, it is an event. The State cannot tax it any more than it can tax a date, and the expression "tax upon the succession" becomes meaningless.

The truth is that the succeeding by B. to a part of what was A.'s property at the moment of death is not affected by the fact that the State at the same moment succeeds to another part. The part the State retains to itself does not come out of the part to which B. succeeds. The succeeding by B. does not depend upon the succeeding by the State, or *vice versa.* The accurate statement of what happens is that the State succeeds to part and B. to another part. The two events are simul-

taneous and independent each of the other; neither event is conditioned or dependent upon the other.

"'An Inheritance Tax' is an incident of the exercise by the State of the right to regulate the devolution of a decedent's property; the price or bonus exacted by the State as a condition of the transfer of his property."

A price or bonus exacted from whom? Who pays it? It cannot be exacted from the dead man or the dead man's property. A dead man does not exist. He cannot have property. The State must, then, exact the bonus from some living person. If so, it is levying a tax upon his property, and our phrase means, "An Inheritance Tax is a property tax incident to the exercise by the State of its right to regulate the devolution of a decedent's property," &c. No one disputes the State's power to levy such a tax, but that is the very thing which the phrase-maker seeks to avoid.

The right to take property by descent or devise is the creature of the law and not a natural right. It is a privilege and the authority which confers it may impose conditions upon it, may tax the privilege.

We have already analyzed the content of this statement. We might add the following comment: No one doubts that the right to take property by devise or descent is a privilege conferred by the State which may tax the privilege. But is the "right to take property by descent" any less a *property right* because it is called a privilege? It is not right in the abstract but *my* right, something I *own*, my property, while I have it, be it for only an instant or for all time. Of course, the State may tax it, but when the State taxes it the State is taxing property.

We submit, with respect, that the real nature of what is popularly called an "inheritance tax" or "succession tax" is not changed tho' it is obscured by the use of such language as we have commented upon. There is and can be no tax upon an inheritance or succession except as a tax upon property. On the other hand, the State has an undoubted right to succeed to A.'s property when A. dies and his ownership ceases. In the exercise of

this right the size of the part to which the State succeeds depends upon the State's pleasure, but the exercise of the right is limited by the very nature of the right to the moment of A.'s death. We may for convenience or by custom give the name "inheritance tax," "succession tax," or "transfer tax" to the part of a decedent's property to the ownership of which the State succeeds; but the name is unfortunate and confusing, for not only is the thing it is meant to denote not a tax at all, but the very same name is often used for an entirely different concept, a genuine property tax, as in England.

The essential distinction between the State's succeeding at the moment of his death to the ownership of what belonged to a decedent and the State's appropriation by arbitrary fiat or otherwise of what has become the property right of another is of the first importance. Not only are the two things widely different in themselves, but the difference is emphasized when we contrast, for example, what the British Parliament may do and what one of our State Legislatures, in dealing with the property rights of citizens. When Parliament speaks, it is the final word of the sovereign. If that word be arbitrary or unjust, there is no remedy but an appeal to Parliament. Parliament is the State. When one of our Legislatures speaks, it is the voice of an agent of the State, an agent possessing but a limited power of attorney to express the sovereign's will. When a Legislature appropriates by taxation or otherwise the property right of a citizen, he may invoke in his defense the Constitution of his State and of the United States, which greatly restrict legislative invasion of property rights.

The history of Parliamentary legislation and the decisions of English Courts upon them, though interesting to students, afford no criterion of what a legislature of one of our United States may rightly do. In England none of the series of acts of Parliament which since 1796 have made the death of a subject an opportunity to benefit the public treasury has paid any attention to whether the public treasury was filled through the State's succeeding at the moment of death to the

ownership of what was the decedent's or through taxation of the property of the living. In either event, the validity of the Act was undoubted. In fact, the understanding or even the study of the fundamental principles which must underlie any just system of property taxation is comparatively modern. Governments always needed revenue and more revenue. The subject could not withstand the power of the government, and the government paid more regard to the productiveness than to the justice of the tax.

It is in this country, where the conception of a government with limited and defined powers has been in process of realization, that we find the most frequent and the most informing discussions of questions of taxation whether by students of political science or in the decisions of the courts. The Constitutions of almost all of our States limit the legislative power to levy taxes upon property according to the rule of equality; and when a State made the death of a property owner an opportunity to increase the public revenues, the State statute enacted for that purpose could be tested by the standard set by the State Constitution.

Louisiana in 1828, North Carolina in 1846, and Virginia in 1844, enacted "Inheritance Tax" laws. These were the only States, save Pennsylvania, which will be treated separately, in which there were "inheritance taxes" prior to the adoption of the 14th Amendment to the United States Constitution. It is significant that their validity was sustained by the courts not as levying a property tax, but as an exercise by the State of its right to succeed to a decedent's property at his death (*Succession of Mager* (1846), 12 Robinson (La.), 584; *Eyre* v. *Jacob* (1858), 14 Gratt, 422). Before the adoption of the 14th Amendment (1898) the decisions of the State courts upon taxing statutes were rarely before the United States Supreme Court for review. The *Mager* case, however, reached the Supreme Court and the Louisiana statute was sustained as not levying a tax upon property and, therefore, not violating the principle of equality which must be observed by a valid property tax (8 How., 487, decided in 1850).

"Inheritance Tax" statutes have multiplied in recent years and the 14th Amendment has enabled their provisions to be reviewed by the Supreme Court. The most informing decisions by that Court as to the real nature of such a tax are *U. S.* v. *Perkins*, decided in 1896, affirming *In re Merriam*, 141 N. Y., 479, and *Plummer* v. *Coler*, 178 U. S., 115, decided in 1900. In each decision the Court reviewed the New York Act, commonly known as the Transfer Tax Law (the one under which the case at bar arose). In the *Perkins* case a decedent had bequeathed all his property to the United States and the question was whether New York State could retain a part of the legacy as against the United States. In the *Plummer* case, a part of the decedent's property at death was in United States bonds, and the question was whether the State could include in the part retained for itself a percentage of these bonds. The substance of the Supreme Court's decision in each case was that a decedent could bequeath to other than the State only so much of the property he ceased to own at death as the state permitted, that the part retained by the State was not taken out of what was bequeathed to others and was, therefore, not a tax upon property. This part was not bequeathed by him at all, but passed directly to the State at his death.

In the *Perkins* case the Court affirmed the construction of the statute by the New York Court of Appeals, which held in *Matter of Merriam*, 141 N. Y., at p. 484:

> "This tax, in effect, limits the power of testa-
> "mentary disposition, and legatees and devisees
> "take their bequests and devises subject to this
> "tax imposed upon the succession of property.
> "This view eliminates from the case the point
> "urged by the appellant that to collect this tax
> "would be in violation of the well-established rule
> "that the state cannot tax the property of the
> "United States. Assuming this legacy vested in
> "the United States at the moment of testator's
> "death, yet in contemplation of law the tax was
> "fixed on the succession at the same instant of
> "time. This is not a tax imposed by the state on
> "the property of the United States. The property
> "that vests in the United States under this will is

"the net amount of its legacy after the succession
"tax is paid."

In the *Plummer* case the Court held that in order to ascertain the value of the part which passed to the State at decedent's death it was proper to appraise the United States bonds as well as other securities which he owned at death.

The history of the "Inheritance Taxes" in Pennsylvania is very instructive. Not until 1874 did the State Constitution contain any restriction upon the legislative power to tax property. In 1852, the Supreme Court of Pennsylvania, speaking through Gibson, C. J., declared that there was no constitutional restriction upon that power, and upheld a statute imposing a grossly discriminating tax upon property.

> "In England, taxes were laid by the sole au-
> "thority of the king till the reign of Edward the
> "First, who bound himself and his successors to
> "exercise this part of the prerogative only with
> "the assent of the lords and commons; but though
> "it ceased to be royal and became national, it
> "ceased not to be an attribute of sovereign power.
> "* * * But it is a postulate of a state consti-
> "tution, which distinguishes it from the federal,
> "that all the power of the people is delegated by it,
> "except such parts of it as are specifically re-
> "served; and the whole of it is, without exception,
> "vested in the Constitutional *dispensers of the*
> "*people's money. As regards taxation, there is*
> "*no limitation of it.*" (*Kirby* v. *Shaw*, 19 Pa. St., 258, 260 (1852).)
>
> "There is no provision in the Constitution that
> "taxation shall be equal." (*Weber* v. *Reinhard*, 73 Pa. St., 370, 373 (1873).)

It was natural, therefore, that the early decisions of the Pennsylvania Courts upon the "Inheritance Tax" law of that State passed in 1826, should have paid little or no regard to whether that statute or its amendments levied a tax upon property. The *Short* case, decided in 1851 (16 Pa. St., 63), Gibson, C. J., rendering the opinion of the Court, is a notable illustration. Short died a resident of Philadelphia on December 5th, 1849,

leaving personal estate both within and without the State of Pennsylvania. The "Inheritance Tax" law provided that

> "All estates, real, personal and mixed, of every "kind whatsoever, passing from any person who "may die seized or possessed of such estate being "within this Commonwealth, either by will or "under the intestate laws thereof or any part of "such estate * * * shall be subject to a "tax."

In 1850, after Mr. Short's death, and while his estate was in process of administration, the Legislature passed an act declaring that the words "being within this commonwealth," in the section quoted above,

> "Shall be so construed as to relate to all persons "who have been, *at the time of their decease*, or "now may be, domiciled within this common-"wealth; and this is declared to be the true in-"tent and meaning of said act."

Short's executors offered to pay a tax upon the property within the State, but refused to pay upon the property without the State. The Court held:

> "No clause of the Constitution forbids it (the "Legislature) to extend a tax already laid or to "*tax assets not taxed* before; and in establishing "its peculiar interpretation, it has only done in-"directly what it was competent to do directly, "and, therefore, the retroactive form of the statute "was unimportant."

Under the title *Carpenter* v. *Pennsylvania*, the *Short* case went to the United States Supreme Court (17 How., U. S., 456, decided in Feb., 1855). No question was raised as to the inequality of the tax. The main point under discussion was the alleged retroactive character of the taxing statute. Mr. Justice Campbell, speaking for the Court, held that where an estate was in process of settlement it was competent for the State to impose a tax upon *property* not taxable at the time of the probate of the will. The pith of his

opinion sustaining the Pennsylvania act of 1850 is found in the following extracts:

> "The validity of the Act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to *levy taxes upon personal property* belonging to its citizens, but situated beyond its limits, denied * * * If the State during this period of administration and control by its tribunals and their appointees, thinks fit to *impose a tax upon the property*, there is no obstacle in the Constitution and laws of the United States to prevent it." (Citing cases.)
>
> "The Act of 1850, in enlarging the operation of the Act of 1826, and by extending the language of that Act beyond its legal import, is retrospective in its form; but its practical agency is, to subject to assessment, property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And as the Supreme Court has well said, 'in establishing its peculiar interpretation it (the Legislature) has only done indirectly what it was competent to do directly.'"

Even before the 14th Amendment to the Constitution of the United States in 1868, and the equality of taxation amendment to the Pennsylvania Constitution in 1874 the Courts of that State began to recede from their previous position as to "Inheritance Taxes" and to approximate the one mentioned here as correct. (The *Strode* case, 52 Pa. St., 181, the *Eckert* case, 53 Pa. St., 102, both decided in 1866; and see also the later cases, *Mellon's Appeal*, 114 Pa. St., 564; *Howell's Appeal*, 147 Pa. St., 164; *Williamson's Estate*, 153 Pa. St., 508.) The leading case, however, is the *Cope* case, decided in 1899 (191 Pa. St., 1).

The following section was added to the Pennsylvania Constitution in 1874:—

> "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the

"authority levying the tax; but the general as-
"sembly may, by general laws, exempt from tax-
"ation public property used for public purposes,
"actual places of religious worship, places of burial
"not used or held for private or corporate profit,
"and institutions of purely public charity. All
"laws exempting property from taxation, other
"than the property above enumerated, shall be
"void." Art. 9, Secs. 1 and 2.

In 1897 the Pennsylvania legislature passed an Act of which the following is the first section:

"That from and after the passage of this Act
"all personal property of whatsoever kind and
"nature which shall pass by will, or by the in-
"testate law of this State, from any person who
"may be seized or possessed of the same, * * *
"shall be and the same is hereby made subject to
"a tax of $2 on every $100 of the clear value of
"such personal property, after deducting the debts
"of the decedent and costs of administration *
"* * to be paid for the use of the Common-
"wealth; and all heirs, legatees, devisees, admin-
"istrators, executors, and trustees shall only be
"discharged from liability for the amount of such
"taxes * * * by paying the same for the use
"aforesaid as hereinafter directed: Provided,
"That personal property to the amount of $5,000
"shall be exempt from the payment of this tax in
"all estates: And provided, further, that so much
"of the estates of persons heretofore deceased as
"has not been actually distributed and paid to per-
"sons entitled thereto prior to the passage of this
"Act shall be liable to the tax imposed by this law,
"as well as the estates of persons who die here-
"after."

In the *Cope* case this statute was held beyond legislative power either under the provisions of the Pennsylvania Constitution or when tested by the fundamental principles of taxation. Sterrett, C. J., rendered the opinion of the Court:—

"The Act in question has none of the features
"of an intestate law, or of an act regulating the
"disposition of property by will or by instru-
"ments in the nature thereof. On the contrary,

" upon its face, and in all its provisions it is mani-
" festly a tax law, clearly and distinctly predicated
" of the actual existence and general operation of
" an intestate law and a will's act, under the oper-
" ation of one or other of which the personal prop-
" erty intended by its provisions to be subject to
" taxation would pass from the then, as well as sub-
" sequent owners thereof to others, or had thereto-
" fore passed and become vested in others prior to
" the date of the Act under consideration." * * *

" Having thus seen that the Act in question is
" essentially and avowedly a 'tax law' imposing
" a state tax on certain specified personal property,
" and providing for the collection thereof, let us
" briefly inquire whether it offends against the
" fundamental principles of taxation or the pro
" visions of our Constitution relating thereto."
* * *

" 'It is of the very essence of taxation that it
" 'shall be relatively equal and uniform, and, where
" the burden is common, there should be a common
" 'contribution to discharge it. (Cooley, Cont.
" 'Law, 495.)'

" In his treatise on Taxation, 2nd ed., pp. 2, 3,
" the same learned author says:

" 'In an exercise of the power to tax, the pur-
" 'pose always is that a common burden shall be sus-
" 'tained by common contributions, regulated by
" law according to some uniform ratio of equality.
" 'The power is not, therefore, arbitrary, but rests
" on fixed principles of justice, which have for
" their object the protection of the taxpayer against
" 'exceptional and invidious exactions, and is to
" 'have effect through established rules operating
" impartially.

" 'Equality in the imposition of the burden is of
" 'the very essence of the right, and, though absolute
" 'equality and absolute justice may not be attain-
" 'able, the adoption of some rule tending to that
" 'end is ndispensable. Equality, as far as prac-
" 'ticable, and security of property against irre-
" 'sponsible power are principles which underlie the
" 'power of axation as declared ends and principles
" 'of fundamental laws. (Desty on Taxation, 29.
" 'and cases there cited.)' * * *

" By necessary implication, the first clause of
" that Section (Sect. I, Art. 9, Pa. Const.) recog-

"nizes the authority of the legislature to justly and "fairly, but never arbitrarily, classify those sub- "jects of taxation with the view of effecting rela- "tive equality of burdens. A pretended classifi- "cation that is based solely on a difference in "quantity of precisely the same kind of property "is necessarily unjust, arbitrary and illegal. For "example, a division of personal property into "three classes with a view of imposing a different "tax rate on each,—class 1 consisting of personal "property exceeding in value the sum of $100,000, "class 2 consisting of personal property exceeding "in value $20,000 and not exceeding $100,000, "and class 3 consisting of personal property not "exceeding in value $20,000—would be so mani- "festly arbitrary and illegal that no one would at- "tempt to justify it (p. 21). * * *

"If the legislature had authority under the Con- "stitution, to do what was done in this case, they "had like authority to reverse their order of taxa- "tion, &c., and thus impose the tax on personal "property amounting in value to $5,000 and less, "and exempt therefrom all property of some recog- "nized class in excess of that sum; and conse- "quently they have like authority, in every case, "to establish any other arbitrary ratio between the "amount in value of property to be taxed and that "which shall be exempt therefrom, in any class "of subjects (p. 23). * * *

"Appellant's suggestion, that we have a pre- "cedent for exemption in the proviso to our col- "lateral inheritance tax law, has no force when we "recall the fact that said provision was enacted in "1826 (P. Law, 227) long before the adoption of "our present Constitution containing the limita- "tions on the powers of the legislature which we "have been considering. No such limitation ex- "isted in 1826, when the proviso to our collateral "inheritance tax law was enacted, and, of course, "it was a valid enactment, which has never been "repealed or modified" (p. 25).

Both the foundations and the doctrines of the *Short* case have been destroyed in Pennsylvania and the principles advocated in this brief are the law in that State.

There are now numerous "Inheritance Tax" and

"Succession Tax" statutes in the several States, and their validity as tax laws have been the frequent subject of judicial interpretation. The Courts have held, with practical unanimity, that if they are taxes upon property they are unconstitutional and void. And the test as to whether they are taxes upon property is not their names but their essential nature. "The mere calling "of such a tax a 'Succession Tax' does not make it dif- "ferent from an ordinary tax upon property, where "the effect and operation are identical with an ordinary "property tax." (*State* v. *Switzler*, 45 S. W., 245, decided by Missouri Supreme Court in 1898.)

An interesting case arose in California in 1899 (*re Stanford*, 58 Pac., 462) in which the decision turned upon the fact that an "inheritance tax" is the succeeding by the State at the moment of decedent's death to the ownership of so much of what was then decedent's as is expressed by the amount of the tax, and that the State's ownership begins at decedent's death.

The Constitution of California forbids the legislature to make a gift of any public money or thing of value to any individual or corporation. In 1897 the California legislature amended its "Inheritance Tax" law by exempting certain persons and classes and providing the exemptions should "apply to all property which has passed by will, succession or transfer since the approval of the Act of which this Act is amendatory" except when payment had already been made. It was held unconstitutional. The Court says:

> "It is only by virtue of the statute that an heir "is entitled to receive any of his ancestor's estate, "and the legislature can provide that the whole or "only a portion shall go to the heir or other bene- "ficiaries upon the death of the ancestor. This "being so, and the legislature in this case having "determined that 95 per cent. of the decedent's "estate may go to his heirs and beneficiaries, and "that 5 per cent. be retained to the State, it is too "clear for argument that this 5 per cent. vested in "the State at the same time that the 95 per cent. "vested in the heirs or beneficiaries. 'An estate "'is vested when there is an immediate right of "'present enjoyment, or a present fixed right of

"'future enjoyment.' 4 Kent. Comm., 202. The "State here, from the death of the decedent, had a "present fixed right of future enjoyment to the 5 "per cent. of his estate. This is property or a "thing of value belonging to the State" (p. 465).

In a recent case (1898) in Montana (*Hinds* v. *Wilcox*, 55 Pac., 355, 358), Pigott, J., in his opinion says:

"Testator, Wilcox, died in 1896, while the act "imposing a tax upon the privilege of taking by "succession or will was not passed until 1897. At "the time of his decease, every sane person over 18 "years of age might dispose of all his estate by "will, to take effect at his death. The state thus "granted to the testator the privilege of devising "property, and to the beneficiaries named in the "will the privilege of receiving it. This priv-"ilege was not encumbered or charged with the "burden of a tax at the time it was exercised. "Before testator's death, the devisees had a mere "privilege, which was revocable by law, but when "the will took effect the mere pre-existing priv-"ilege was merged into a right. Then it was, if "ever, that the right to take vested and became "property. *Brenham* v. *Storey*, 39 Cal., 179; "*Black Const. Law*, 429; *Cooley Const. Lim.*, p. "359; *Beach, Mod. Eq. Jr.*, Sec. 1045; *Crosw. "Ex'rs & Admin'rs*, Sec. 171; *Westervelt* v. *Gregg*, "12 N. Y., 202; *Ervin's Appeal*, 16 Pa. St., 256; "*Clarke* v. *McCreary*, 12 Smedes & M., 347; *Rock "Hill College* v. *Jones*, 47 Md., 1; Civ. Code, "Secs. 1794, 1851. Vested rights must, of neces-"sity, be protected from legislative interference, "irrespective of constitutional checks and guards. "*Andrews* v. *Russell*, 7 Black, 474; *Town of Dun-"ville* v. *Pace*, 25 Grat., 1. Section 1 of the four-"teenth amendment to the federal constitution, and "sections 3 and 27 of article 3 of the constitution of "Montana, imply, if indeed, they do not express, "a prohibition against the power of the legislature "to enact a law whose effect would be the impair-"ment of a vested right. *Westervelt* v. *Gregg*, "*supra*; *Jones* v. *Robbins*, 8 Gray, 329; *Bank* v. "*O'Kely*, 4 Wheat., 235; *Cooley, Const. Lim.*, "354; *Osborne* v. *Nicholson*, 13 Wall., 654; "*Farrington* v. *Tennessee*, 95 U. S., 679; *Dash* v. "*Van Kleeck*, 7 Johns., 477. Taxes on succes-

"sions and the privilege of taking under wills are "laid in diminution of a new capital, which now "comes to the hands of persons on the death of "the former owner. *Cooley, Tax'n*, p. 22. When "the courts affirm the tax to be upon the privilege, "they are speaking, not of successions in being or "wills in effect before the act imposing the tax was "passed, but of the revocable permission granted "to succeed or take thereafter. The power to tax "includes the power to destroy. If the legislature "has power to levy a tax of 1 per cent. or 5 per "cent. on a vested right, it has authority likewise "to destroy the right by imposing a tax equal to "the value of the property passing to the heirs or "devisees. It is not a question of degree, but of "power. The concession that the legislative as-"sembly has power to subject to a tax the exercise "of a vested and accrued right involves the logical "concession that it may, in the guise of taxation, "impose a burden which will deprive the right of "any value. Authority which permits a person to "be deprived of his property by indirection is as "much within the meaning and spirit of the con-"stitutional limitations as where it attempts to do "the same thing directly. *Merrill* v. *Sherburne*, "1 N. H., 199; *In re Handley's Estate*, 15 Utah, "212, 49 Pac., 829."

From what has been said, it is plain that in examining an "inheritance tax" statute the first question to be determined is, whether it is or is not a tax upon property. If it be a tax upon property, the next question is, whether it observes or violates the constitutional restrictions (State or National) upon the legislative power to impose such taxes. We shall follow that order in presenting our argument in the present case.

The following propositions are abundantly supported by the fundamental principles already discussed.

Assume that the State authorizes the creation of the following estates by will:

A. dies owning $10,000 and by his will gives this $10,000 to B. The passing of title or transfer or succession is complete at the instant of A.'s death. B. becomes at that moment the succeeding owner and holds the $10,000 by a title created and guaranteed by the

State. The state cannot thereafter take it or any portion of it from B. against his will save by taxing it. The $10,000 is B.'s property;

A. dies owning $10,000 and by his will gives the use of the $10,000 to B. for life with remainder to C. At the instant of A.'s death the ownership of the $10,000, carved into the two estates for life and remainder, passes at once to B. and C. Each gets at that instant an absolute property right created and guaranteed by the State. The State thereafter cannot take this property right or any portion of it against the will of the owner save by taxing it.

Assume that the State decrees an "inheritance tax" of ten per cent., *i. e.*, says that a man may dispose by will of only 90 per cent. of what he owns at death and that the remaining 10 per cent. becomes the State's and that A. makes the same bequests as in the previous illustrations;

The bequests under A.'s will are worth but 90 per cent. of their face value to his legatees and beneficiaries. But their property rights in this 90 per cent. vest immediately upon A.'s death, and the State cannot *thereafter* take those property rights or any portion of them against the will of the owner save by taxation.

In brief, though the power to dispose of property by will is a voluntary grant by the State, and until the grant is exercised, the State can limit or wholly withdraw the grant; *after* it has been exercised it is too late for the State to withdraw or limit the grant. It cannot tax the *vesting* of property rights under the will for they have *already* vested. What it may do is to impose a property tax upon these vested rights. In other words, a retroactive "inheritance tax" is in the nature of things a tax upon property.

Applying these principles to the decision of the questions raised in the case at bar, we shall show:

That Subdivision 5 of Section 220 of the Tax Law imposes a tax upon property;

That said subdivision imposes a tax in violation of the Fourteenth Amendment to the Constitution

of the United States whether the tax be regarded as a tax upon property, or as a price or charge for a privilege accorded by the State;

That Article X (entitled Taxable Transfers) of the New York Tax Law, enforces the payment of the "tax" or "charge" imposed by section 220 upon estates in remainder, in a manner contrary to Section I of the Fourteenth Amendment of the Constitution of the United States, and this is so whether the imposition be regarded as a "tax upon property" or a "charge for a privilege accorded by the State";

That whether said Subdivision 5 of Section 220 be construed as imposing a tax or making a charge for a privilege, it arbitrarily creates a particular class of property owners and discriminates against that class for the sole reason that in the chain of title to their property there is a power of appointment (exercised or unexercised);

That said Subdivision 5 of Section 220 imposes a discriminating and arbitrary tax upon property owners in whose chain of title is a power of appointment, exercised or unexercised, in that it taxes in this case stocks in incorporated companies liable to taxation upon their capital, tax exempt bonds of the State of New York, and tax exempt stock of the City of New York; and, further, that the taxation of said canal-improvement bonds and New York City stock is forbidden by Section X of Article I of the Constitution of the United States.

POINTS.

POINT I.

The Power of Appointment Amendment to the New York Transfer Tax Law imposes a tax upon property.

1. *The legislative intent to impose a tax upon property by this Amendment is plain upon its face.*

Any other construction distorts the ordinary meaning of the language used. Read it:

"5. Whenever any person or corporation shall "exercise a power of appointment derived from "any disposition of property made either before "or after the passage of this act, such appointment "when made shall be deemed a transfer taxable "under the provision of this act in the same man-"ner as though the property to which such appoint-"ment relates belonged absolutely to the donee of "such power and had been bequeathed or devised "by such donee by will; and whenever any person "or corporation possessing such a power of appoint-"ment so derived shall omit or fail to exercise the "same within the time provided therefor, in whole "or in part, a transfer taxable under the provisions "of this act shall be deemed to take place to the "extent of such omissions or failure, in the same "manner as though the persons or corporations "thereby becoming entitled to the possession or "enjoyment of the property to which such power "related had succeeded thereto by a will of the "donee of the power failing to exercise such power, "taking effect at the time of such omission or "failure."

Is the intent of the legislature altered one jot if the section reads:

A power of appointment derived from any disposition of property either before or after the passage of this Act shall be deemed a transfer, when exercised or when not exercised, in whole or in part, within the time provided therefor, to the extent that it is not exercised. Such transfer shall be taxable under the provisions of this Act as though the persons becoming entitled to the possession or enjoyment of the property mentioned in the power had succeeded to said property by a will of the donee of the power as absolute owner?

Is there any doubt that the legislature intended no distinction between the exercise and the non-exercise of a power of appointment for the purposes of this Act? That each, without distinction, is to be *deemed* a transfer, that is, is to be treated for *taxing* purposes *as if* it were a transfer? The rate of tax to be determined *as if* the donee of the power were the owner and devised or bequeathed it by will?

Unquestionably the legislature did so intend. There is no pretense that there is an actual transfer or that the donee is the actual owner or that he really devises and bequeathes. Nor did the legislature intend to alter or repeal the statute against perpetuities in favor of the donee of a power of appointment. The plain intent is that for taxing purposes, and for taxing purposes only, a power of appointment is to be deemed a transfer and the property mentioned in it is to be taxed at certain rates established by the statute.

This is entirely within the competency of the legislature provided it does not infringe the limitations set by the Constitution. Whether it does so infringe we do not discuss at the moment. The point to which we direct attention is that the legislature intended to tax property and the term "transfer" is used solely to fix the rate of taxation.

2. *The power of appointment amendment is retroactive in its effect and as such is a tax upon property or else as to the plaintiffs in error it is wholly ineffective.*

David Dows, Sr., died in 1890. In his will he placed certain property in trust to pay the income to his son David Dows, Jr., during the latter's life, with remainder over among his son's children as his son should appoint by will (fols. 8-10, 13-15). These were David, 3d, Robert and Kenneth, all living at the death of David Dows, Sr., and still living at the death of David Dows, Jr., in 1899 (fols. 25-6). David Dows, Jr., appointed the property among them in equal shares (fols. 21-2).

When did the titles to these remainders vest? Or, to put the same question in another form, when did the ownership begin of the right to these remainders upon the termination of the life of David, Jr.? And who were the owners?

Assuming that the power of appointment made no difference in the source of the title or the time when

the title vested—the truth of which we shall presently show—the ownership by the grandchildren of these estates began the instant David Dows, Sr., died. The ownership of David Dows, Sr., ceased then and at the same instant began the ownership by his successors of the several estates for life and in remainder of the *corpus* which David Dows, Sr., owned at death. At the instant of his death there accrued to each grandchild the right to the future enjoyment of the *corpus*, the income of which was to be paid to their father during his life. Each grandchild at the instant of the grandfather's death had a *vested* future estate subject to open and let in after-born children and to be divested by the death of their parent. The only contingency which would defeat their actual possession and enjoyment of the *corpus* (*i. e.*, their remainders vesting in possession) was their death before the death of the parent. This is the settled law of New York. Many authorities might be cited, but *Campbell* v. *Stokes* (142 N. Y., 23), decided in 1894, is sufficient. The provisions of the will there construed are precisely the same as to effects as the provisions of the will of David Dows, Sr.

Under each will the grandchild's actual possession and enjoyment of the *corpus* was in the future, but the right to the future enjoyment was vested. This vested right is *property*. That, when the State takes some of the *corpus*, thus diminishing the very thing the right to the enjoyment of which is already owned by a title guaranteed by the State, it is interfering with property, requires no argument.

We do not dispute the power of the legislature, in the absence of constitutional restrictions, to tax this vested right to future enjoyment, but we desire to emphasize the absolute impossibility, either in fact or in legal fiction, that the legislature levy a tax or duty, impost or excise upon or impose a burden upon or attach a condition to or regulate a "vesting" *after* the vesting has occurred.

3. *It is the settled law of New York that the existence or exercise of a power of appointment does not change either the source or the time of the transfer of title. The property passes by the will or deed of the owner of it (the creator of the power), and necessarily at the date of that instrument.*

The mere existence unexercised of the power of appointment, of course, produces no effect upon a title. This was well known of all men, including the members of the legislature, and this fact emphasizes the intent of the legislature by the Amendment of '97 to reach property.

It is equally well settled that the exercise of a power of appointment does not change either the source or the time of the vesting of title. This also was well known to the members of the legislature and they did not contemplate or intend any change in the law in this respect. What the legislature intended was to reach certain property by taxation and to fix the rate and amount of the tax. Accordingly, it declared, that when the time limit within which a power of appointment could be exercised expires (whether the power has been exercised or not) and the actual beneficial enjoyment of the *corpus* mentioned in the power begins, this coincidence shall for *taxing purposes* be treated *as if* the title to the *corpus* was transferred from the donee of the power as owner to the persons entering upon the actual beneficial enjoyment of the *corpus*. It is to be so treated because in this way the rate and amount of the tax is determined. That this is the true interpretation of the legislative intent is apparent from an examination of the statute, and the Appellate Division of the Second Judicial Department of New York so holds in *Matter of Seaver*, decided in July, 1901. William A. Seaver died in '83, a resident of Westchester County, New York, leaving a will which created a trust in $10,000 the income of which was to be paid to his brother's widow during her life, and giving to her the absolute power of disposing of the $10,000 by her last will. She died

in 1899, a resident of Erie County, New York, leaving a will in which she exercised the power in favor of her son Luke. The Court states the following as one of the questions to be passed upon: "Whether for the purposes and within the meaning of Sec. 220 (the Power of Appointment section) the title passed under the will instead of under the power." Goodrich, P. J., speaking the unanimous opinion of the Court, says:

> "I do not mean to intimate that the *actual* title "to the fund for *other than taxing purposes* was "derived from the mother. The contrary proposi- "tion is true, but section 220 explicitly declares "that it is the exercise and not the creation of a "power of appointment which effects the transfer "upon which the tax is enforced. Hence, the fund "must, for *taxing* purposes, be regarded as having "passed from mother to son." 63 App. Div., 284.

I. e., "the actual title" passed in 1883 upon Seaver's death, "the transfer upon which the tax is enforced" in 1889. This "transfer" can be nothing else than the actual possession and enjoyment of the *corpus*, for the transfer of the actual title, *i. e.*, the right to the enjoyment, passed sixteen years before.

But we do not need this recent judicial confirmation of the principle already well settled in numerous cases in New York and other States, that the title to property mentioned in an exercised power of appointment, like the one in the case at bar, passes from the creator of the power at the time of its creation. The validity or invalidity of the title to property has often depended upon the observance or violation of this principle. It was so held in *Genet* v. *Hunt* (113 N. Y., 158).

Miss Field, in anticipation of marriage with George F. Riggs, executed a trust deed which conveyed all her estate to trustees, to pay the income to her during coverture, and if she died during coverture to convey the property to such persons as she might direct by will. She did die during coverture, leaving two children, and by her last will and testament gave all her estate to her executors in trust to pay the income to her children in equal parts during their lives, with the remainders on the death of either to his heirs and next of kin; in case of

the death of either child during minority and without issue the whole estate was to be held in trust for the survivor during life with remainder to his heirs and next of kin; in case of the death of both children during minority and without issue, the whole estate was given absolutely to designated beneficiaries. The question to be determined was whether this will made a valid disposition of the property. If the property passed under the *trust deed creating* the power of appointment, then the power of alienation was suspended during three lives, two of which were not in being when the trust deed went into effect. On the other hand, if the property passed by the *exercise* of the power of appointment, then the power of alienation was suspended only during two lives in being. The Court said:

> " *We think the validity of the suspension in the* " *will of Mrs. Riggs is to be determined by the test* " *whether it would be valid if it had been part of* " *the limitation of the trust deed and had been in-* " *serted therein at the time the deed was executed.* " This seems to be the rule of our statute and it is " the rule of the common law in respect to appoint- " ments under special powers " (p. 170).

The Court held that the trusts were created at the date of the deed creating the power, and were, therefore, invalid.

It was well said by Andrews, Ch. J., in the opening words of the Court's opinion in *Hillen* v. *Iselin* (144 N. Y., 365) that "The donee of a special power to appoint an estate given by deed or will is invested with an *authority* merely." The donee has no title to convey or transfer. How can *he* transfer or convey what he has not?

That David Dows, Jr., transferred and could transfer no property or estate by the exercise of the power of appointment in his father's will is well illustrated by the case of *Commonwealth* v. *Williams* (13 Pa. St., 29). In that case a testator had devised property in trust for his daughter during her life, and after her death in trust for such persons as she might appoint by will. The daughter died leaving a will devising the

property to or in trust for her brothers and sisters or their children, lineal descendants of her father. Under the Pennsylvania Inheritance Tax Law if the property passed collaterally (*i. e.*, under the will of the daughter) there was a tax. If it passed lineally (*i. e.*, under the will of the father) there was no tax. The Court says, at page 32:

> "But Mary Williams was never seized of the "estate in fee. She had but a life estate, which "was expended by her death. What she never had "she could not grant. She could not pass the "estate by her will. She could only designate the "persons to whom the estate would pass *by her "father's will.* The devise is after her death to "such persons as she shall appoint by will. She "appointed lineal descendants of her father, and "the estate passed to them by his will. This seems "plain enough, so plain that it is unnecessary to "complicate the question by any discussion about "the nature of the power of appointment. The "authorities sustain the view I have expressed."

The *Harbeck* case decided by the New York Court of Appeals (161 N. Y., 211) is to the same effect. John H. Harbeck died February 2d, 1878. His will gave $300,000 in trust, the income thereof to be paid his widow, Eliza D. Harbeck, during her life, and gave her power to appoint such persons as she might select to take the principal upon her death. The widow died January 16th, 1896, and by her will appointed the property among a number of persons. At Mrs. Harbeck's death the Transfer Tax Law (Chap. 399, Laws of 1892) was in force.

Did the Act affect Mrs. Harbeck's appointees? The Appellate Division held that it did. The Court of Appeals held that it did not.

The part of the Act under consideration was:

> "Section 220. TAXABLE TRANSFERS.—A tax "shall be and is hereby imposed upon the transfer "of any property, real or personal, of the value "of five hundred dollars or over, or of any interest "therein or income therefrom, in trust or other-

"wise, to persons or corporations not exempt by "law from taxation on real or personal property, "in the following cases:

"1. When the transfer is by will or by the in- "testate laws of this state from any person dying "seized or possessed of the property while a resi- "dent of the state.

"2. When the transfer is by will or intestate "law, of property within the state, and the de- "cedent was a non-resident of the state at the time "of his death.

"3. When the transfer is of property made by "a resident or by a non-resident, when such non- "resident's property is within this state, by deed, "grant, bargain, sale or gift, made in contempla- "tion of the death of the grantor, vendor or donor, "or intended to take effect, in possession or enjoy- "ment, at or after such death. Such tax shall also "be imposed when any such person or corporation "becomes beneficially entitled, in possession or ex- "pectancy, to any property or the income thereof "by any such transfer, whether made before or "after the passage of this act.

"Such tax shall be at the rate of five per centum "upon the clear market value of such property, ex- "cept as otherwise prescribed in the next section."

The Appellate Division construed the clause in Subdivision 3 commencing "Such tax shall also be imposed," &c., as applicable to the transfers in each of Subdivisions 1, 2 and 3, and held that, though the Court of Appeals had decided that the Act was not retroactive, the vesting in possession of Mrs. Harbeck's appointees at her death was taxable.

The Court of Appeals affirmed its previous construction that the Act was not retroactive, reversed the Appellate Division and reached the same conclusion as it had already done in the *Seaman* case (147 N. Y., 74) where the Court had under consideration the same Subdivision 3, and, holding that the clause commencing "Such tax shall also be imposed," &c., applied only to grants or gifts *causa mortis*, further held that the remainders under the will of a testator dying in 1876 vested at his death and were not affected by Chap.

399, Laws 1892, though the remainders established by the will did not vest in possession till the death of the life tenant in 1893.

> "A right of succession passed to the four living "children of George at the death of testator [in "1876]. It came from him; it was transferred "by him; taking effect at his death; and passed "then or never. But the right itself, although "vesting in the successors at once, had its own "peculiar character. It could not ripen into pos- "session or enjoyment until the death of the life "tenants, and before that event was contingent "solely as to the persons who should eventually "take and the proportions to be observed. The "legatees as a class were certain; the particular "individuals were alone uncertain." (*In re Seaman*, 147 N. Y., at p. 75.)

The only difference between the facts in the *Seaman* case and those in the *Harbeck* case was the exercise of the power of appointment in the latter. But the Court reaffirmed the correctness of *Genet* v. *Hunt* (*supra*). The Court said:

> "In the language of Chancellor Kent, 'An estate "'created by the execution of a power takes effect "'in the same manner as if it had been created by "'the deed which raised the power. The party "'who takes under the execution of a power, takes "'under the authority and under the grantor of "'the power, whether it applies to real or personal "'property, in like manner as if the power and "'the instrument creating the power had been in- "'corporated in one instrument.' (4 Kent's Com., "338.) So, while the power of appointment did "not take effect until after the death of Mrs. Har- "beck in 1896, it was not the authority by which "the beneficiaries acquired the fund. The source "of their title to the fund was the original will of "John H. Harbeck, which went into effect in 1877, "and into that instrument must be read the names "of the appointees, although designated by a later "instrument. For those who take under a power "of appointment, take as if their names were in "the grant of the power" (p. 218), and again, "the property passed by the will of the owner of

"it and necessarily as of the date of that instru-
"ment" (p. 222).

The *Seaman* and *Harbeck* cases taken together prove conclusively that the *vesting of title to* the remainder and not *the actual possession and enjoyment of the vested* remainder was reached by the Transfer Tax Law as it stood in 1892.

In 1897 (Laws 1897, Chap. 284), Section 220 was amended. The clause in Subdivision 3 commencing "Such tax shall also be imposed" (omitting the "also"), was made a new Subdivision 4; the final clause in Subdivision 3, fixing the tax at five per cent., became Subdivision 6, and an entirely new Subdivision 5 was added, the so-called "Power of Appointment Amendment" already quoted in full.

As we have already seen, this amendment, by its very language, intended a tax upon property, and so far as it is retroactive could not be effective except as it is a tax upon property. No one will deny that in 1890, when David Dows, Sr., died, the laws of the State of New York gave at that time to his grandchildren vested rights to the future enjoyment of the estates appointed to them. *It seems to us clear that no subsequently enacted statute could prevent the vesting which had already happened.* It is equally clear that, admitting, for argument's sake, that the Legislature may tax the vested estate at the moment when the actual possession and enjoyment of its corpus begin, it can only do so by taxing it as already the property of its possessors who in this case are David Dows, 3rd, Robert Dows and Kenneth Dows, minor children of David Dows, Jr.

4. *The opinion in the Vanderbilt case upon which rests the decision of the Court below in the case at bar demonstrates that the tax under the Power of Appointment is a tax upon property.*

The decision of the Court below rests upon *in re Vanderbilt* (163 N. Y., 597) which affirmed without opinion the decision of the Appellate Division. The

opinion of the latter Court (50 App. Div., 246) is printed in full at pages 38 to 42 of the Record. It is significant that the cases relied upon to support the reasoning and conclusions in the *Vanderbilt* case were solely cases affirming, upon the particular facts in those cases, the right of the legislature to tax property. The main reliance of the Appellate Division was *Carpenter v. Pennsylvania* (the *Short* case) already discussed, in which the question under consideration was the validity of a property tax levied by the legislature at a time when there were no constitutional restrictions upon such taxes in Pennsylvania. And, as we have seen, the doctrine of the *Short* case has been repudiated in Pennsylvania. The decision of the Court below in the case at bar rests upon the decision in the *Vanderbilt* case; the decision in the *Vanderbilt* case upon the decision in the *Short* case upon a property-taxing statute half a century ago before the equality of taxation clause was in the Pennsylvania Constitution and before the existence of the Fourteenth Amendment to the Constitution of the United States. This does not seem to us a sound foundation.

The facts in the Vanderbilt case were:

> "William H. Vanderbilt died in 1885, and his "will was admitted to probate in the month of "December of that year. The trust fund involved "in this proceeding was established in favor of his "son Cornelius, who was to enjoy the income for "life. The testator directed that upon the death "of Cornelius the fund should be paid to his law-"ful issue in such shares or proportions as Cor-"nelius might by his last will have directed or "appointed, and in default of such appointment "the gift is made directly to the issue with an al-"ternative disposition on failure of such issue. "Cornelius Vanderbilt died in 1899, leaving a last "will and testament, which was duly admitted to "probate, and in and by which he exercised the "power given by the will of his father, by appoint-"ing a certain specified portion of the fund to "one of his sons and directing that the balance be "equally divided among his other children. At "the time of the death of William H. Vanderbilt,

"*this fund*, or the *right of succession* to it, was not "taxable under the collateral inheritance tax law." (Fol. 70.) "The Surrogate decided and decreed "that the *fund* is subject to a transfer tax of one "per cent. under and pursuant to Chap. 284 of "the Laws of 1897," the "Power of Appointment-"ment Amendment" (fol. 71). The Court said:

"It was held in *Carpenter* v. *Pennsylvania* (17 "How., U. S., 456) that where an estate was ac-"tually in the process of settlement, it was compe-"tent for the State *to impose a tax upon property* "not taxable at the time of the probate of the will. "The remarks of Mr. Justice Campbell in that "case upon the subject are convincing. The ex-"act situation of the fund in this case, as affected "by the question is the following: For purposes "of general construction and *the derivation of* "*title* to the fund as it now stands, the gift of the "remainder comes under the will of William H. "Vanderbilt. When he died, the law as it then "existed made no provision for the *taxation of* "*the ultimate right of succession* to the fund. "The legal title to it upon the probate of his will "was in his executors until they accounted in the "Surrogate's Court, constituted the fund out of "the assets of the estate, and transferred it from "themselves as executors to themselves as trustees, "which we assume in this case was done. Then "they held the fund still under the will, but un-"distributed and finally undistributable until the "power of appointment was exercised by Corne-"lius Vanderbilt. Meantime, and while they held "it so undistributed in fact, the State in the exer-"cise of its general power of taxation, found it "expedient to *tax the right to the succession*, which "right had not theretofore been taxed, making the "transfer consist in that act by which each of the "appointees became entitled to claim and to receive "the particular or specific distributive share al-"lotted to him. Of the general power of the "State to fix the time at which *the right* of suc-"cession shall be taxed, and to define what shall "be a transfer within the meaning of that act, "we have no doubt, so long as that definition does "not involve a violation of either contract or "vested rights." (Fols. 74-5.)

This is the pith of the opinion, and no one will dispute the truth stated in the concluding sentence.

Apparently, the learned Justice uses the expressions "ultimate right of succession" and "right of succession" as interchangeable and as meaning the actual possession and enjoyment of the *corpus* of his remainder by the remainderman. But whether he means this or means the vested right which accrued to the grandchildren at their grandfather's death to the future enjoyment of the *corpus*, the thing reached by the tax is not *res nullius;* it is already owned and can only be taxed, if at all, as property.

The learned Justice who delivered the opinion of the Court below in the case at bar (printed in full at pages 44 to 48 of the Record), after stating that the Court was concluded by the *Vanderbilt* decision already made, added this further exposition of what was meant by the statute's definition of "transfer" in the "Power of Appointment Amendment":

> "It is insisted, however, that the title of the "present owners is deduced from the will of David "Dows, Sr., and not from that of his son, David "Dows, Jr., and in support of this claim are cited "the cases of *Genet* v. *Hunt* (113 N. Y., 158) and "*Matter of Harbeck* (161 N. Y., 211). The "proposition is doubtless true to a certain extent. "For the purpose of determining whether the exe- "cution of the power is in contravention of the "statute of perpetuities, the estate created under "such power must be referred back to the instru- "ment granting the power. *This is settled law* "and was so held in *Genet* v. *Hunt* (*supra*). Any "other rule would permit the evasion of the statute "against perpetuities by the grant of powers" (fols. 82-3).

i. e., the actual source of title and the time of its transfer or vesting is not changed by this taxing statute and *Genet* v. *Hunt* is still the law as it was before this taxing statute was enacted. The learned Justice continues:

> "But, whatever be the technical source of title "of a grantee under a power of appointment, it "cannot be denied that in reality and substance it

"is the execution of the power that gives the "grantee the property passing under it" (fol. 83).

The learned Justice has just affirmed as "settled law" the *Genet* case which holds that there is no such thing as "property passing under a power" and that the property passes under the instrument creating the power. Calling the doctrine "technical" does not change its character as settled law nor weaken its "reality and substance" in determining the validity of titles. The doctrine of *Genet* v. *Hunt* is a very serious reality to the owners and purchasers of real estate in New York. We submit that the phrase "property passing under a power" is too loose and general an expression for the foundation of any judicial argument. We might paraphrase the sentence in the learned Justice's opinion as follows:

"But whatever be the technical source of title "of a remainderman, it cannot be denied that in "reality and substance it is the termination of the "life estate which gives him the property."

i. e., the enjoyment, the possession. But this possession and enjoyment cannot be taxed as a metaphysical entity, it is property. The learned Justice realizes this and attempts a further explanation:

"The will of Dows, Sr., gave his son a power of "appointment, to be exercised only in a particular "manner, to wit, by last will and testament. If, "as said by the Supreme Court of the United "States, the right to take property by devise is not "an inherent or natural right, but a privilege ac- "corded by the State, which it may tax or charge "for, it follows that the right of the testator to "make a will or testamentary instrument is equally "a privilege and equally subject to the taxing "power of the State. When David Dows, Sr., "devised *this property* to the appointees under the "will of his son he necessarily subjected *it* to the "charge that the State might impose on the priv- "ilege accorded to the son of making a will. That "charge is the same in character as if it had been "laid on the inheritance of the estate of the son

"himself—that is, for the privilege of succeeding "to property under a will" (fol. 83).

This reasoning seems to us sophistical; like one of the old-time metaphysical arguments of the school men it is in reality a play upon words and will not bear analysis or comparison with the facts. The learned Justice has just explained that *Genet* v. *Hunt* still expresses the settled law in New York, that the power and the instrument creating the power are one instrument, that the donee's exercise of the power is in law the donor's act, occurring at the date of the instrument creating the power and shown that no other view is possible without creating chaos in titles and upsetting the whole law of powers. Necessarily, therefore, the devise to David Dows, Sr.'s grandchildren under his will passed to them, became their property, at the instant of his death in 1890, and the learned Justice so declares. "*But,*" he says, "the right to take property by devise is a 'privilege' which the State may tax or for which the State may charge, and, therefore, the property which passed to the grandchildren by devise years before is subject to a later tax or charge, which is not to be regarded as a tax upon property, though taken out of their property, because the right of David Dows, Sr., to make a will containing a power of appointment made the execution of the power by will subject to a subsequent charge by the State for the 'privilege' of making a will; and whatever charge the State makes for such 'privilege' is only in seeming taken out of the property which passed to the grandchildren at their grandfather's death; that such charge is the same in character as if it had been laid for the 'privilege' of succeeding to property under a will."

It is plain enough that in reality and substance the "charge" is taken out of the grandchildren's property long after the right to that property vested in them, and that the "charge" is, and must be, a tax upon property however we may attempt to disguise the disagreeable fact by verbal dialectic.

The smooth sentences of the learned Justice ignore

also another important fact. The power of appointment and its execution are parts of the instrument creating the power, the will of David Dows, Sr.; and neither of them can be construed or considered as any portion of David Dows, Jr.'s, will without overruling the *Genet* case, which the Court not only expressly declines to do, but, on the contrary, reaffirms.

In another respect, also, the reasoning of the learned Justice is fundamentally unsound. When David Dows, Sr., died, the "privilege" of making a will containing a power of appointment which could be executed by deed or will was a part of the law of the State of New York. This "privilege" was exercised and the consequences of it became *property rights* the instant David Dows, Sr., died. One of the property rights that then vested was the right of David Dows, Jr., to exercise the power of appointment. The right to use this power in the manner set forth in David Dows, Sr.'s will was a most valuable property right vested in David Dows, Jr. If the State can tax it at all after the death of David Dows, Sr., it must tax it as property (*re Cope*, 191 Pa. St., 1; *re Stanford*, 58 Pac., 462; *Hinds* v. *Wilcox*, 55 Pac., 355; *Westervelt* v. *Gregg*, 12 N. Y., 202, *supra*).

We have already (p. 12), ante) analyzed the statement that "the right to take property by descent or devise is a privilege, and the authority that confers it may tax the privilege" and shown its true content. It is only by regarding the "Transfer Tax," as it is called in New York, "the Inheritance Tax" or "Succession Tax," as it is usually called elsewhere, as something which passes directly to the State when decedent's ownership ceases, that we avoid the conclusion that such "tax" is a taking by the State of the property of a citizen. If, after, with the State's consent, I have given at my death a power to designate the recipients of what was then mine, the State taxes the designation and collects the tax out of the property conveyed by my will, is it not a very thin subterfuge, an intentional blinking of the truth, to say that this tax is not upon the property conveyed? Is not the view, admittedly

adopted merely for taxation purposes, that a donee of a power in exercising it is making his own will, and that such exercise is not a part of the donor's will creating the power, just such a subterfuge?

The *Seaver* case (*supra*) shows how transparent the subterfuge is. It will be remembered that Seaver died in 1883, a resident of Westchester County. His brother's widow, for whose benefit he created the trust to pay her the income of $10,000, with remainder to whom she might appoint, died in 1899, a resident of Erie County. In New York, wills must be proved in the county of testator's residence at death. His estate was administered in Westchester County, hers in Erie. She never had any title to the fund. She was simply beneficiary of a trust. She could and did convey nothing. Her executors, of course, had nothing to do either with the fund or its income. Yet, upon her death, her son, Luke, the appointee of the fund, is for *taxing* purposes adjudged to receive the fund under his mother's will as if she were the owner; and Seaver's testamentary trustee, who never had any power to alienate the fund, whose qualified fee existed solely for the purposes of the trust and expired with the life estate, and who had no control over the remainder to Luke, is called before the Surrogate's Court of Erie County and made personally liable for the amount of the tax if he turns over the fund to the remainderman without first taking out of it for the State the amount of the tax. If this is not a tax upon property, what is it?

The Appellate Division, in affirming the judgment of the Surrogate as approving the rule laid down in the *Vanderbilt* case, said through its presiding Justice:

> "I do not mean to intimate that the actual title "to the fund for other than taxing purposes was "derived from the mother. The contrary propo- "sition is true." (63 App. Div., at p. 285.)

What a solemn farce it all is! And what a dangerous invasion upon the property rights of citizens! Of what avail are the Constitutional guarantees of

equality of taxation if such a subterfuge meet with the approval of the Courts? Does not the reasoning of the Court below in the case at bar (quoted *supra*) point clearly to what dangerous lengths we may yet go if the fair seeming but specious doctrine that "a privilege accorded by the State may be taxed or charged for," is made the sufficient test of the Legislature's authority to tax? Is it not time to call a halt? Have we not already reached the *reductio ad absurdum* point in applying that doctrine? If I own property and desire to exchange it for property you own and are willing to give in exchange, or if I desire to give property outright to you, is not "the right to convey property and the right to receive property a creature of the law, each a privilege accorded by the State which it may tax or charge for?" And since these are "privileges" may they not be taxed or charged for with little or no regard for the safe-guards against unjust and unequal taxation which our Constitution is supposed to provide?

The learned Justice who delivered the opinion of the Court below in the case at bar shrinks from the logical consequences of his own reasoning and concludes the part of his opinion already quoted:

> "Had the fund passed in default of an exercise
> "of the power of appointment, a very different
> "proposition would be presented. We express
> "no opinion on the question whether, under such
> "circumstances, the tax imposed by the amend-
> "ment of 1897 could be deemed other than a tax
> "on the property itself" (p. 232).

But why? Is it not as much a "privilege" to enter upon the actual possession and enjoyment of property mentioned in a power of appointment if the power is unexercised as if it is exercised? If a "privilege" accorded by the State is the basis of the "charge," why should not the Sate charge for the privilege in the one case as well as the other? It is the "privilege" of enjoying the same property.

The so-called "Inheritance Taxes" can be sustained upon a sounder basis than a resort to so dangerous and

specious a doctrine as the one relied upon by the Court below in this case, from the logical consequences of which the Court itself shrinks, and which has already compelled the mental dislocation involved in considering that the real ownership of property passes at one time and the taxing ownership of the same property at another.

5. The legislative intent by the Amendment of 1897 to tax property is further shown by reading Section 220, Subdivision 5 (the "Power of Appointment Amendment") with the preceding portions of the Section.

In our analysis of the Appellate Division stage of the *Harbeck* case (*supra*) we set out the words of the statute before and after the amendment of 1897. It will be recalled that the Appellate Division held that the transfers to Mrs. Harbeck's appointees were taxable under Subdivision 3 as it read at her death, but was reversed upon the ground that Section 220 was not retroactive and that the title to the remainder had vested long prior to the existence of that Section.

In 1897 the Section was recast (page 36 *ante*) and the sentence beginning "Such tax shall be imposed," &c., made into a Subdivision 4 and applicable to the "transfers" described in Subdivisions 1, 2 and 3. Section 220, Subdivision 1, applies to all wills of testators dying after its adoption in 1897, and no one will dispute that the appointee under a power in such a will takes his title from the testator by a transfer under this subdivision. This is the *actual* transfer of title. Under Subdivision 4 the tax upon this transfer is imposed when the appointee becomes beneficially entitled in possession or expectancy to the property. Under Subdivision 5, the "Power of Appointment Amendment," another "transfer" is *deemed* to take place when the time limit for the exercise of the power expires. This also is taxable. The rates of the two taxes and the amounts of the exemptions may be quite different. For lineals, the rate is one per cent. and the exemption

$10,000; for a nephew or niece, the rate is five per cent. and there is no exemption. Under Subdivision 4 relationship (or lack of it) to the testator determines the rate and amount of exemption, and under Subdivision 5 the relationship (or lack of it) to the donee of the power. As to wills of testators dying after 1897, therefore (according to the "price" or "privilege" method of reasoning), when the State has had its "price" or "charge" for the "privilege" of the "*actual* transfer" under the provisions of Subdivisions 1 and 4, it charges again for the "privilege" of the "*deemed* transfer" under the provisions of Subdivision 5.

No other logical conclusion is possible, for there is no repeal of the tax upon the transfer under Subdivision 1 payable under Subdivision 4 at the rate fixed by Subdivision 6 and Section 221; and there is another transfer under Subdivision 5, the rates and amounts of tax being also fixed by Subdivision 6 and Section 221. There are thus two transfers, each taxable, a real transfer and an artificial transfer for taxing purposes only.

For example: Let A. die childless in 1898 bequeathing by his will property to trustees for the life of B., his widow, to pay the income to her during her life and granting B. authority to appoint among his nephews and giving in default of such appointment the remainder to said nephews, share and share alike. Let B. die in 1899. At A.'s death in 1898 there is a transfer to the nephews taxable at the rate of five per cent. (Tax Law, Section 220, Subdivisions 1 and 4, *Genet* v. *Hunt, Matter of Seaman, Matter of Harbeck, supra,* and the Court of Appeals opinion in the case at bar). At B.'s death in 1899 there is another transfer whether she exercises the power or not (Tax Law, Section 220, Subdivision 5, *re* Vanderbilt, *supra*). This transfer is also taxable at the rate of five per cent.

Take another example: Let A. die childless in 1898 leaving minor children and no widow, and bequeath property to trustees to pay the income for the benefit of the children until the youngest child dies or attains the age of twenty-one years, whichever event shall sooner occur, and granting authority to B. to appoint the prop-

erty among the children and giving in default of such appointment the remainder to said children, share and share alike. As before, there is a transfer to A.'s children upon his death in 1898. This transfer is taxable at the rate of one per cent. When the youngest child attains the age of twenty-one years there is also another transfer. This transfer is taxable at the rate of five per cent.

These examples illustrate the wholly artificial character of the imaginary transfer set forth in Subdivision 5 and may serve to emphasize that the real thing taxed under that Subdivision is the property owned by the transferees under Subdivision 1. Incidentally, also, they show the essential inequality and injustice of the "tax" or "charge for a privilege" which Section 220, Subdivision 5, imposes.

6. That the legislature by the Amendment of 1897 intended to tax property is shown not only by the language of that amendment, but by the fact that the legislature has, by a series of enactments added to the Transfer Tax, shown that it intended by the Amendment of 1897 to inaugurate the definite policy of taxing property under the provisions of that law.

We have pointed out that there was and could be no *actual* transfer from David Dows, Jr., at his death, for he had nothing which he could transfer, and that the transfer was from David Dows, Senior, nine years before. This "transfer" might as well have taken place in the previous century so far as any subsequently enacted law could tax it. A transfer expends itself in the happening. It goes without saying that no price or toll as a condition of the happening could be exacted after the happening. The result of the transfer, the thing transferred, persists, and it is this which is the subject of the tax. In other words, it is the property itself. We do not dispute the right of the legislature to tax property; but it seems to us that Subdivision 5 of Section 220 is nothing if not a tax upon property.

It may please the legislature to call the exercise or non-exercise by the donee of a power of appointment a transfer from such donee to the recipient of the property referred to in the appointment, but the donee having nothing to transfer can transfer nothing. A definition even by the legislature does not change the real nature of the thing defined. The actual thing that happens upon the death of the donee of a power of appointment, who has exercised or failed to exercise the power, is not a transfer from the donee, or the donor of the power (the transfer from the donor of all his rights had occurred long before), but the entering by somebody into the enjoyment of the rights transferred by and from the donor. These property rights are and must be what are taxed by Subdivision 5, for there is nothing else to be taxed or out of which the tax can be paid.

The sensible interpretation of Subdivision 5 seems to us to be that whenever, after the exercise of or the failure to exercise a power of appointment, any one becomes beneficially entitled to the property mentioned in such power, the value of such property rights shall be taxed at rates determined by the degree of relationship between the donee of the power and the person entitled to the property rights in question, *as if* the donee had owned the property and bequeathed it to the person receiving it.

The meaning of the provision thus becomes clear, it imposes a tax upon property.

This is in accord with the general legislative policy since 1896.

The Legislature by successive amendments has more and more clearly shown that as to various classes of estates the "transfer" theory no longer applies, that as to those classes the intent of the statute is to *reach the property itself when* its recipients enter into its actual possession and enjoyment, in marked analogy to the English Succession Tax Law, which is frankly a tax upon property.

> "* * * *Whether the power was derived*
> "*from a disposition of property made either be-*
> "*fore or after the passage of this act* * * *
> "whenever any person * * * shall exercise

"a power of appointment * * * such ap-
"pointment when made shall be *deemed* a trans-
"fer taxable under the provisions of this act in
"the same manner *as though* the property to which
"such appointment relates belonged absolutely to
"the donee of such power and had been bequeathed
"by such donee by will." (L. 1897, Chap. 284.)

And if the power is not exercised "a transfer
"taxable under the provisions of this Act shall be
"*deemed* to take place to the extent of such omis-
"sion or failure, in the same manner *as though*
"the persons * * * thereby *becoming en-*
"*titled to the possession* or enjoyment of the *prop-*
"*erty* * * * had succeeded thereto by a will
"of the donee." * * * (L. 1897, Ch. 284.)

"The *increase of benefit* accruing to any person
"* * * upon the extinction or determination
"of [a] charge, estate or interest * * * [sub-
"ject to which the property was transferred] shall
"be *deemed* a transfer of property taxable * *
"*as though* the person beneficially entitled
"thereto had *then* acquired such increase of
"benefit from the person from whom the title
"to their respective estates or interests is derived."
(Laws 1897, Chap. 284.)

"*But any property heretofore* or hereafter de-
"vised or bequeathed to any person who is a bishop
"or to any religious corporation shall be exempted
"from and not subject to the provisions of this
"Act." (L. 1898, Chap. 88.)

"*All estates upon remainder or reversion which*
"*vested prior to June 30th, 1895*, shall be * *
"*taxed* when the person beneficially interested
"shall come into actual possession or enjoyment."
(Laws 1899, Chap. 76.)

"The (*property*) exemptions enumerated in
"Section Four of the Tax Law [the General Prop-
"erty Tax Law of the State], of which this Article
"(Transfer Tax Law) is a part, shall *not be con-*
"*strued* as being applicable in any manner to the
"provisions of Article Ten (Transfer Tax Law)
"hereof." (Laws 1900, Chap. 382.)

"Estates in expectancy which are contingent
"or defeasable and in which proceedings have not
"been taken * * * shall be appraised at their
"*full undiminished value* when the person entitled
"thereto *shall come into the beneficial* enjoyment
"or possession thereof." (Laws 1901, Chap. 173.)

"All estates in remainder or reversion which "*vested prior to May 1st, 1892*" shall be "*taxed* "when the persons beneficially interested shall "come into actual possession or enjoyment." (Laws 1901, Chap. 173.)

We submit that no one can read this series of enactments without the conviction that beginning with the "Power of Appointment Amendment" of 1897, the legislative policy in New York has departed widely from the strict lines laid down by the *Merriam* and other cases (*supra*) as the true basis for "Transfer Taxes," and is now attempting to tax property.

POINT II.

The power of appointment of 1897, imposes a tax in violation of the Fourteenth Amendment to the Constitution of the United States, whether the tax be regarded as a tax upon property, or as a price or charge for the privilege accorded by the State.

The foregoing proposition needs illustration rather than argument:

"Equality in right, in protection, and in burden, "is the thought which has run through the life of "this nation and its constitutional enactments from "the Declaration of Independence to the present "time. Of course, absolute equality is not attain- "able, and the fact that a law, whether tax law or "other, works inequality in its operation, does not "prove its unconstitutionality. * * * But "when a tax law directly, necessarily, and inten- "tionally creates an inequality of burden, it then "becomes imperative to inquire whether this in- "equality, thus intentionally created, can find any "constitutional justification."

"It is apparent that the mere fact of classifica-
"tion is not sufficient to relieve a statute from the
"reach of the equality clause of the Fourteenth
"Amendment, and that in all cases it must appear,
"not only that a classification has been made, but
"also that it is one based upon some reasonable
"ground—some difference which bears a just and
"proper relation to the attempted classification—
"and is not a mere arbitrary selection."

1. *The unconstitutionality of the Power of Appointment Amendment as a tax upon property.*

We think that we have demonstrated that the tax imposed by the Power of Appointment Amendment of 1897 is a tax upon property. Assuming it to be such a tax, it is clearly unconstitutional and void under the provisions of the Fourteenth Amendment to the United States Constitution. The Law of 1897 arbitrarily selects a particular class of property owners and fixes a rate of tax upon their property according to an arbitrary system based upon no reasonable ground nor upon any just or proper relation to the attempted classification. Under this law every person as to whom there is found a power of appointment in the chain of title to his property is placed in a special class by itself; and upon the expiration of the time limit within which the power can be exercised such property is taxed at special rates fixed by the arbitrary assumption that the donee of the power was the prior owner and grantor of the property, and by the accidental degree of relationship or no relationishp of such donee with him.

Consider: The donee of a power who admittedly is not and cannot be the owner of the property mentioned in a power of appointment is first for purely taxing purposes declared by legislative fiat to be the true owner; then the Legislature declares that the degree of *his* relationship with those who get their title to the property from the actual owner and can get it from no other source shall fix the rate of tax! Can anything be more absurd, more arbitrary, more unjust, as a basis for taxation?

2. *The unconstitutionality of the Power of Appointment Amendment as a "price" or "charge" for "a privilege accorded by the State."*

The Constitution of the United States guarantees the equal protection of equal laws to every citizen. Is the equal protection of equal laws afforded to one who, because he inherits property mentioned in a power of appointment, is put into a special class and made to pay a special price based, not upon his consanguinity with the testator who owned and bequeathed the property, but upon the accident of his relationship or lack of it with some one who did not own the property and had no interest in it? Is this not arbitrary, unjust, discriminating classification? A mere arbitrary selection based upon no reasonable ground? Why not make relationship with the President of the United States or the Governor of the State, or the King of Denmark the test? They, too, might be "deemed" owners for taxing purposes by the Legislature. How far may the Legislature go upon the "charge for privilege" theory? Can the Legislature make the age or sex of the legatees or color of hair or eyes the basis for the amount of the "charge"?

We submit that there is a fundamental principle involved in the application of even the "charge for privilege" doctrine; the amount of the charge must have some reasonable basis; it must not be purely arbitrary; and if there be classification in charges, the ground for the classification must be at least reasonably just and proper. What just and proper relation to the charge for the privilege of enjoying the property mentioned in a power of appointment has the consanguinity or lack of it between the mere donee of a power and the recipients of the property?

Possibly such a "tax" or "charge" might be sustained as an exercise of the police power to suppress powers of appointment or diminish their number, but not otherwise.

If the Court agrees with the conclusions already reached there will be no occasion for it to consider the other matters which are discussed in this brief. But if the Court should hold that further argument is either desired or necessary, there are still some important questions remaining which we submit for its consideration.

POINT III.

Article X (entitled Taxable Transfers) of the New York Tax Law, enforces the payment of the "tax" or "charge" imposed by Section 220 upon estates in remainder, in a manner contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States; and this is so whether the imposition be regarded as a "tax upon property" or a "charge for a privilege accorded the State."

For the purpose of the argument under this head we may leave out of consideration any suggestion of a power of appointment in the chain of title of the remainderman.

The New York Transfer Tax Law declares that under the will of a testator bequeathing property to A. for life with remainder to B, the tax or charge upon the "transfer" to B. attaches upon the testator's death, and must be paid at once, or interest will run at six per cent., and presently additional interest as a penalty until the tax or charge be paid (fols. 84 and 85; section 223 of Tax Law).

Now this tax, or charge, if paid, must be paid out of something and by somebody. The statute requires that it be paid out of the property transferred, and executors may not secure their discharge till it is paid, and are personally liable if it is not paid. (Sections 222 and 224 of Tax Law.) In the case of a remainder, when the personality of the remainderman is uncertain, a different rule prevails. In such case the tax or charge is made at the death of the testator, but payment is not required, interest does not run, and there is no penalty until the remainderman is ascertained (fols. 85 and 86). Usually this occurs when the actual possession and enjoyment of the *corpus* of the remainder begin. The State proceeds upon the theory that in the first case there is a known person against whom a judgment for the amount of the "tax" or "charge" can be enforced, and in the second case neither the amount of such "tax" or "charge" is known, nor the person against whom can be enforced a judgment therefor until the time stated. In both cases the payment is to be made out of the property transferred.

The facts of the case at bar fall under the first of these classes, and the statute requires the payment of the "tax" or "charge" upon the remainder of David Dows, 3rd, Robert Dows and Kenneth Dows, at their appraised value on January 13th, 1899, the date of their "deemed" transfer, with ten per cent. per annum added until the same is paid. Let us see what this means. Who is to pay this sum, and out of what?

In the case at bar, the estates transferred are a legal estate to A. for life of B., but not beyond the date when B. attains a specified age, with remainder to C. The statute fixes the amount to be paid as a "tax" or "charge" upon the transfer to A. of his life estate. Assume this to be paid. There is no second tax or charge upon such transfer, and B. is entitled to the full enjoyment of his estate without further payment for its transfer to him.

But at this point the statute says either a further payment must be made out of the principal which sup-

ports his estate in order to satisfy the "charge" or "tax" upon the transfer of the estate in remainder to C., or the amount of such "charge" or "tax" shall roll up with interest and penalty against such remainder. We submit that either alternative conflicts with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law and denies to such citizens the equal protection of the laws.

If the State enforces the first alternative, A. is made a forced contributor to the payment of the "tax" or "charge" upon the transfer to C. During the whole period of his life estate he is deprived of the income which the amount of his tax would produce. It seems plain that for a State to compel one person to pay from his estate a tax, or even a small part of a tax, properly chargeable against another, is not only manifest injustice in itself, but is directly contrary to the commands of the Fourteenth Amendment to the Constitution of the United States.

But suppose the State adopts the other alternative and postpones the collection of the "tax" or "charge" until the actual possession and enjoyment begin of the *corpus* of the remainder. Let us see how this method will operate. Let a testator bequeath a legal estate to A. for life with remainder to B., a nephew. A. lives twenty-five years, then dies, B. surviving him. B., the nephew, must now pay for the privilege of inheriting the property 250 per cent. of the original charge, *i. e.*, three and one-half times five per cent. (or 17½ per cent.) of the value of the remainder when A. entered upon the life estate. Nor is it at all improbable that 17½ per cent. of that value may be fully 50 per cent. or more of the actual value when B. enters into possession and has any property out of which to pay the tax.

Suppose in the case just cited that during A.'s life B. dies leaving a cousin as sole heir, and the cousin dies leaving a nephew as legatee, A. then dying. The State has a choice, under the first alternative, of muleting the

value of A.'s life estate each time the personality of the remainderman changes in an amount determined by the degree of consanguinity between the successive remaindermen; or

Under the second alternative, of waiting till A. dies and the final remainderman enters into possession and then taking out of the *corpus* the total of the successive transfer charges with accumulations of interest and penalties, which may easily exceed the whole remainder and will certainly confiscate the greater portion of it, and in any event compels the final remainderman to contribute toward the tax, or charge upon the transfers of the preceding remaindermen.

It surely does not need argument that these provisions of the statute, are intolerably arbitrary and discriminating.

The remedy is simple. The charge or tax levied by the State upon a transfer of estates in remainder should be made payable *without interest or penalty* when the remainderman enters upon the possession and enjoyment of the *corpus* of his remainder. Such a course is entirely within the State's power. The features we are discussing of the present statute are repugnant to every principle of justice.

Nor is their arbitrary, unjust and discriminatory character, nor the difficulty of enforcing them, relieved, if the course suggested in the judgment below by the learned counsel for the defendants in error be adopted, and the remainder be sold to satisfy the charge or tax. Consider what an estate in remainder really is. When a testator bequeathes an estate to A. for life, with remainder to B., what is it that B gets? Not the *corpus* which supports A.'s life estate, but the right to have and enjoy that *corpus* if he outlives A., the present right to the enjoyment of something in the future, a mere expectancy, which may never ripen into realization. The executors of the testator have no control over this expectancy; they cannot dispose of it nor any portion of it. We doubt whether any court or statute could clothe them with power to do so; they have neither the title to, interest in, nor possession of, the estate in remainder.

To make them personally liable would be to compel them, out of their own pockets, to pay a stranger's tax. But the learned counsel suggests that the remainderman who is the owner of it, but may never, and frequently does not, realize anything out of it, shall raise funds outside to pay the "tax" or "charge," or shall pledge or sell his expectancy. This is to make one pay a tax on account of something he may never get, and to change the character of the tax from a tax *in rem* to a tax *in personam;* and to compel one to pay a tax because he may possibly at some future day enjoy the use of property is clearly an arbitrary abuse, which is forbidden by the Fourteenth Amendment of the Constitution of the United States.

POINT IV.

Whether the Power of Appointment Amendment be construed as imposing a tax or making a charge for a privilege, it arbitrarily creates a particular class of property owners, and discriminates against this class for the sole reason that in the chain of title to their property there is a power of appointment (exercised or unexercised).

It is still the settled law of New York that at the death of David Dows, Sr., in 1890, there was an actual transfer to his grandchildren, and it is admitted that all of the then requirements of the Transfer Tax Law were fulfilled.

It is also the settled law of New York that all property which was real estate at the time of the transfer continues, as to the lineal descendants of the transferor, to be real estate though such descendants may not enter into possession and enjoyment of the property until

years after the transfer and the character of the property has in the meantime been converted into cash or securities. (*Matter of Sutton*, 3 App. Div., 208, affirmed 149 N. Y., 618), and is therefore exempt from a transfer tax.

> "When the property or any beneficial interest "therein passes by any such transfer (to lineal "descendants) such transfer of property shall not "be taxable under this Act unless it is personal "property." (Tax Law, Section 221.)

The decision of the Court below holds that lineal descendants of a testator who puts a power of appointment in his will cannot have the benefit of this exemption, if, in the period between the actual transfer of the property from the testator and the subsequent "deemed" or imaginary transfer under Section 220, Subdivision 5, the real estate devised to them by the testator has been converted into personal property; that is to say, the recipients of property mentioned in a power of appointment, whether exercised or not, are put in a class by themselves and are deprived of an exemption open to all other lineal descendants from the owner of the property, the real transferor.

This applies equally to descendants of testators dying before and of those dying after the enactment of the Power of Appointment Amendment of 1897 (fol. 84). In the case at bar, all the property covered by the Sixth Division of David Dows, Sr.'s will, and a large part of the property covered by the Eighth Division of the will, were real estate at the time of his death. The aggregate value of the real estate which David Dows, Sr., bequeathed at his death to his grandchildren exceeded two millions of dollars (fols. 47-8, 64). Subsequent to his death and prior to the entering upon and actual possession and enjoyment of the property by the grandchildren, this real estate was sold and the proceeds invested in personal property (fols. 26-7). The Court of Appeals holds that the grandchildren of David Dows may not have the benefit of the general exemption provided in Section 221, but that, unlike other owners by devise of real property, inas-

much as their grandfather put a power of appointment in his will, a tax must be paid for the privilege of entering upon the enjoyment of the real estate devised by him to them (fol. 84).

This is discrimination, not classification, and is contrary to the Fourteenth Amendment of the Constitution of the United States.

POINT V.

The Power of Appointment Amendment imposes a discriminating and arbitrary tax upon property owners in whose chain of title is a power of appointment, exercised or unexercised, in that it taxes in this case, stocks in incorporated companies liable to taxation upon their capital, tax exempt bonds of the State of New York, and tax exempt stock of the City of New York.

The Tax Law, Article I, Section 4, Subdivision 16, exempts all other property owners from taxation upon stocks in incorporated companies liable to taxation upon their capital (Cumming's & Gilbert's New York Annotated Tax Laws, 2nd Ed., p. 76). In the property taxed in the case at bar there are included such stocks of the appraised value of $1,852,403.47 (fols. 48, 64-5). This is a direct discrimination against the legatees in the case at bar as compared with other tax payers in the State of New York, not one of whom is taxed upon such property. The injustice of the discrimination is enforced by the fact that the amendment to Article X (the Transfer Tax Law) of the Tax Law, passed in 1900 (Laws of 1900, Chap. 382, page *supra*) is a legislative declaration that prior to such amendment the

general exemptions contained in Article I, Section 4, applied to all transferees under Article X (*Matter of Harbeck*, 161 N. Y., 215; *Matter of Miller*, 110 N. Y., 216).

2. For the same reasons the following property is taxed in the case at the bar in violation of the Fourteenth Amendment of the United States Constitution:

(1) 50 State of New York Canal Improvement Bonds, issued Sept. 4, 1897, pursuant to Chap. 79, Laws of 1895; appraised at $51,635 (fols. 48-9, 65), which are exempt by Article I, Section 4, Subdivision 6, of the Tax Law as amended by Chap. 80, Laws of 1897;

(2) 100 shares Consolidated Stock of the City of New York, issued Nov. 12, 1896, for the redemption of bonds and stock of the City of New York maturing that year; appraised at $109,380 (fols. 48-9, 65), which are exempt by the same Subdivision 6 of Section 4 of the Tax Law, and are also exempt under Sec. 7 of the General Municipal Law, Chap. 685 of the Laws of 1892.

All these exemptions are general exemptions applicable to all owners of property in New York. To exclude the legatees under the will of David Dows, Sr., from the benefit of these exemptions is arbitrary and discriminating and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The said Canal Improvement Bonds and New York City Stock are also non-taxable for the further reason that Section 10 of Article I of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

FINAL POINT.

For the foregoing reasons the decision of the Court below is erroneous; Subdivision 5 of Section 220 of the

Tax Law of the State of New York, and the whole thereof, and Article X of said Tax Law, in so far as it enforces a tax or charge upon the transfer of remainders before the remaindermen enter upon the actual possession and enjoyment of the *corpus* of their estates in remainder, should be declared in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The judgment and decree below should be reversed and the cause remanded with the usual directions to the Court below.

Washington, October Term, 1901.

HORACE E. DEMING,
JULIUS HENRY COHEN,
Of Counsel for Plaintiff in Error.

APPENDIX.

The law as to the taxation of inheritances in 1890, at the death of David Dows, Senior, was Chapter 483 of the Laws of 1885, as amended by Chapter 713 of the Laws of 1887. The Act was entitled "An Act to Tax Gifts, Legacies and Collateral Inheritances in certain cases." In 1890 there was no tax upon the inheritances of lineal descendants. Section 1 of the Act read as follows:

"After the passage of this act all property which shall pass by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, or if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State, or any interest therein, or income therefrom which shall be transferred by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to anybody politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, child, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the State of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent, and any lineal descendant of such decedent born in lawful wedlock, or the societies, corporations and institutions now exempted by law from taxation by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property, and at and after the same rate for any less amount, to be paid

to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof, for the use of the State, and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed, provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." (Chap. 483, L. 1885, am'd by Chap. 713, L. 1887.)

By Chapter 908, Laws of 1896, this law was incorporated, under the title "Taxable Transfers," as Article X of Chapter Twenty-four (The "Tax Law") of the General Laws of the State of New York.

Article X consists of Sections 220 to 242, both inclusive, of the Tax Law. Sections 220, 221, 222, 223, 224 and 242 are the ones with which we are concerned. These sections, on January 13th, 1899, the date of the death of the donee of the power of appointment in David Dows, Sr.'s, will, read as follows:

Section 220. "*Taxable Transfers.*—A tax shall be and is hereby imposed upon the transfer of any property, real or personal of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state and the decedent was a non-resident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

4. (Such tax shall be imposed) When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof of any such transfer, whether made before or after the passage of this act.

5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power taking effect at the time of such omission or failure.

6. The tax imposed thereby shall be at the rate of five per centum upon the clear market value of such property except as otherwise prescribed in the next section." (Chap. 908, L. 1896, am'd by Chap. 284, L. 1897.)

Section 221. *"Exceptions and Limitations.*— When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this State, of the decedent, grantor, donor or vendor, or to any child, to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years

thereafter, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation shall be exempted from and not subject to the provisions of this act." (Chap. 908, L. 1896; am'd by Chap. 88, L. 1898.)

Section 222. "*Lien of tax and payment thereof.*—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer or the comptroller of the county of the Surrogate having jurisdiction as herein provided; and said treasurer or comptroller shall give, and every executor, administrator or trustees shall take duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act, unless he shall produce a receipt so sealed and countersigned by the state comptroller or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by section two hundred and twenty-six of this Chapter. All taxes imposed by this article shall be due and payable at the time of the transfer except as hereinafter provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained

at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." (Chap. 908, L. 1896; am'd by Chap. 284, L. 1897.)

Section 223. "*Discount, interest and penalty.*—If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reasons of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section two hundred and twenty-six of this chapter, interest shall be charged at the rate of six per centum from the accrual of the tax until the date of payment thereof."

Section 224. "*Collection of tax by executors, administrators and trustees.*—Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If

any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor, or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

Section 242. "*Definitions.*—The words 'estate' and 'property,' as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this State. The word 'transfer,' as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words 'county treasurer,' 'comptroller,' and 'district attorney,' as used in this article, shall be taken to mean the treasurer, comptroller or district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-nine of this article." (Chap. 908, L. 1896, am'd by Chap. 88, L. 1898.)

The following sections of the Tax Law are also referred to on the argument:

Section 4. "*Exemptions from Taxation.*—The following property shall be exempt from taxation:

6. Bonds of this state to be hereafter issued by the comptroller to carry out the provisions of chapter seventy-nine of the laws of eighteen hundred and ninety-five, and bonds of a municipal corporation heretofore issued for the purpose of paying up or retiring the bonded indebtedness of such corporation. (Thus amended by L. 1897, Chap. 80.)

16. The owner or holder of stock in an incorporated company liable to taxation on its capital, shall not be taxed as an individual for such stock."

Also the following section from the General Municipal Law:

Section 7. "*Funding of Bonded Debts.*—The bonded indebtedness of a municipal corporation, including interest due or unpaid, may be paid up or retired by the issue of new substituted bonds for like amounts by the board, council or officers having in charge the payment of such bonds. Such new bonds shall only be issued when the existing bonds can be retired by the substitution of the new bonds therefor, or can be paid up by money realized by the sale of such new bonds. Where such bonded indebtedness shall become due within two years from the issue of such new bonds, such new bonds may be issued and sold to provide money in advance to pay up such existing bonds, when they shall become due. Such new bonds shall contain a recital that they are issued pursuant to this section, which recital shall be conclusive evidence of their validity and of the regularity of the issue; shall be made payable not less than one nor more than thirty years from their date; shall bear date and draw interest from the date of the payment of the existing bonds, or the receipt of the money to pay the same, at not exceeding the rate of four per cent. per annum, payable quarterly or semi-annually; and an amount equal to not less than two

per cent. of the whole amount of such new bonds shall be payable each year after the issue thereof. Such new bonds shall be sold and negotiated at the best price obtainable, not less than their par value; shall be valid and binding on the municipal corporation issuing them; and until payable shall be exempt from taxation for town, county, municipal or state purposes. All bonds and coupons retired or paid shall be immediately canceled. A certificate shall be issued by the officer, board or body issuing such new bonds stating the amount of existing bonds, and of the new bonds so issued, which shall be forthwith filed in the office of the county clerk." (Chap. 688, L. 1892.)